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Supreme Court, U.S.
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No. 02 893

IN THE

SUPREME COURT OF THE UNITED STATES

Patricia Eubanks-Jackson-Petitioner

V.

Bank of America, N. A. -Respondent

On Petition for Writ of Certiorari
To The United States court of appeals for the eighth circuit, Eastern Missouri

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PETITION FOR WRIT OF CERTIORARI

Patricia Eubanks-Jackson
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42 pp

QUESTION (S) PRESENTED

1) Did the District Court limit liability time frame on continuous violation in plaintiff's case?

2) Was evidence excluded by the District Court showing that Mrs. Jackson was engaged in statutory protected activity before being terminated by the bank?

3) Did the District Court overlook specific guidelines in the company policy that the bank was to follow before terminating an employee?

4) Did the District Court respond to plaintiff's Motion for Subpoena documents in a timely matter without hindering the discovery process in plaintiff's case?

LIST OF PARTIES

[x] All parties appear in the caption of the case on the cover page.

[ ] All parties do not appear in the caption of the case on the cover page. A list of all parties of the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE

SUPPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts:**

The opinion of the United States district court appears at Appendix **1a** to the petition and is unpublished.

The opinion of the United States district court of appeals appears at Appendix **1b** to the petition and is unpublished.

For cases from **state court:**

The opinion of the highest state court to review the merits of this case has not occurred.

JURISDICTION

For cases from **federal courts:**

The date on which the United States Court of Appeals decided this case was May 16, 2002.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date:

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June 19, 2002, and a copy of the order denying rehearing appears at Appendix **1c**

The jurisdiction of this Court is invoked under 28. U.S.C. § 1254(1).

For cases from **state courts:**

The date on which the highest state court decided this case has not occurred

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment provides:

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law, which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTE

UNLAWFUL DISCRIMINATION

§ 4572. Unlawful employment discrimination.

It shall be an unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;

(2) To limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

STATEMENT OF THE CASE

Patricia Ann Eubanks-Jackson, an African American female filed suit against Bank of America claiming violations of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq.; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq.; and the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010 et seq. Mrs. Jackson claims that because of her race and disability she suffered discrimination, retaliation, prevention of promotions and that the defendant breached their binding contract.

The United States District Court of Appeals affirmed summary judgment in favor of Bank of America, N.A on May 6, 2002. Petition for rehearing and petition for rehearing enbanc was denied June 19, 2002. Judge Morris Sheppard Arnold took no part in the consideration of the matter.

1) Incidents before the limitation period

Plaintiff was offered a Closer II position in June of 1997 by the bank and she excepted the position. Plaintiff started working June 16, 1997. After working at the bank for about a week plaintiff noticed she was not working the job she was hired for. Plaintiff then informed her supervisor of the situation. Nothing was ever done. Plaintiff continued to inform the bank about her job misplacement.

On April 24, 1998 plaintiff applied for an opened Reviewers position within her department. Plaintiff received a job description for the position from the defendant and noticed she was qualified for the job because of her qualifications and work experiences. Plaintiff was turned down for the position and the job remained open for 5 months & 11 days. Defendant continued to look for individuals with similar qualifications.

Five months and eleven days later the bank gave the position to Danielle Devann, a Caucasian female. Ms Devann excepted the Reviewers position, which left the Closer's position opened. Plaintiff applied for the Closer's position October 5, 1998 thinking now the bank will finally put her in the original position she was hired for. After Ms Devann worked her Reviewer's position for about 3 weeks she decided she wanted the Closer's position plaintiff was now applying for. The bank then gave Ms Devann the Closer's position and hired a new person for the Reviewer's position. Plaintiff was asked by her supervisor, to train the new employee her new job.

The Supreme Court has outlined that plaintiff's burden of establishing a prima facie case of disparate treatment in an individual recruiting or hiring case by showing that 1) she belongs to a group protected by Title VII 2) she applied and was qualified for a job for which the employer was seeking 3) she was rejected 4) the position remained open and the employer continued to seek similarly qualified applicants. McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668

Plaintiff has established a prima facie case of disparate treatment in an individual recruiting or hiring case, 1) she is an African American female 2) she applied and was qualified for the positions 3) she was rejected for the position 4) the position remained open 5 months and 11 days and the employer continue to seek similarly qualified applicants. Plaintiff was never promoted to any of the positions she applied for.

The Court held that failure to promote claims occurring in 1998 were untimely because plaintiff filed her discrimination claim with EEOC December 6, 1999, 300 days after she was not selected for the position.

Title VII, continuing violation doctrine allow courts to consider conduct that would ordinarily be time barred as long as the untimely incidents represent an ongoing unlawful employment practice Anderson v. Reno, 190 F. 3d 930, 936 (9th Cir. 1999); see e.g.;Draper v. Coeur Rochester, Inc., 147 F. 3rd 1104, 1107 (9th Cir. 1998).

Defendant never gave plaintiff the equal opportunity at job placement, as they did with

Daniel Devann. This type of unlawful behavior continued until plaintiff's termination date, December 16, 1999 see Fielder, 218 F. 3d at 983.

A supervisory position was opened and plaintiff applied for it June 7, 1999. The Court mentions that defendant selected Mr. McConnell because of his prior management experience, his educational background, his demonstrated leadership ability and his ability to perform all of the functions within the department.

The Court overlooked the documents plaintiff provided which shows her experiences and qualifications such as her resume, her computer skill certificate and her 1998 and 1999 performance appraisals with the bank. Plaintiff had leadership abilities, supervisory experience and a degree in computers. Plaintiff was the only employee from Bank of America who graduated from the American Institution of Banking with honorary distinction in 1999.

It was impossible for plaintiff to work every job function within the department because the defendant didn't give plaintiff the equal opportunity as they gave Mr. McConnell. Plaintiff tried many times to further her career with the bank but they kept hindering her growth.

The United States Supreme Court has held that there is no requirement that a claimant show that he was better qualified that the person ultimately selected for the position in question in order to prevail, since the demonstration of superior qualifications is only one of several ways to raise the inference of discriminatory motivation

Patterson v. Mclean Credit Union 491 US 164. The employer's explanation for its decision to reject the plaintiff was a pretext for discrimination. The existence of a continuing violation, whether it is serial or systematically, continued into the limitation period.

The defendant actions during the period involve the same types of discrimination as those committed before the period. The bank committed the same type of racial discrimination such as repeated denial of promotions, retaliation, harassment and wrongful discharge Green, 883 F. 2d at 1480. Plaintiff has raised a genuine issue of disputed facts.

2) Engaged, statutory protected activity

On August 2, 1999 plaintiff filed a grievance letter with defendants human resource department complaining of unfair treatment, emotional stress, antagonizing threats, discriminatory tactics, prevention of promotions and dishonest accusations. Defendant's human resource manager informed plaintiff that she would investigate the matter and get back with her later.

Defendant called plaintiff in the conference room On August 3, 1999 and accused her of being overpaid 23.5 hours, then demanded her to pay the alleged overpaid hours out of her next check. Defendant never provided proof to plaintiff that she was overpaid 23.5 hours. Plaintiff knew she was being harassed and retaliated against because she filed a grievance letter the day before. Plaintiff made arrangements to pay the alleged 23.5 hours.

To establish a prima facie case for retaliation, plaintiff must show: 1) she has engaged in a protective activity 2) she has suffered an adverse employment decision and 3) there was a causal link between the protected activity and the adverse employment decision Yartzoff v. Thomas, 809 F. 2d 1371, 1375.

Plaintiff has established a prima facie case for retaliation 1) Plaintiff's grievance letter was filed August 2, 1999 2) plaintiff suffered financially when ordered to pay the alleged overpayment of 23.5 hours 3) Plaintiff's filed grievance letter motivated defendant actions.

On August 30, 1999 plaintiff filed a Workers Compensation claim due to a work-related injury. Later that day plaintiff was rushed to the. emergency room and treated for her elevated blood pressure. Plaintiff's doctor asked her to take a day off from work due to severe stress. Upon plaintiff's return to work the next day she found an insulting flyer on her desk stating "DO EVERYTHING WITHOUT COMPLAINING OR ARGUING" Philippians 2:14. During this time defendant was deducting payments from plaintiff's check every pay period until the 23.5 hours was paid. The bank later denied workers compensation benefits on a work-related injury. Defendant's retaliatory actions placed plaintiff in a serious financial bind. Therefore, plaintiff excepted a part time job with Centralize Servicing Center from 5:00pm-9: 00pm (non-Nationbank hours) on September 21, 1999.

There were many derogatory statements

made towards plaintiff. Dennis Chier (the team leader plaintiff filed the complaint against) would shout aloud "Oh, I have a pinch nerve in my neck, I guess I'll file workers comp now". Kevin McConnell shouted aloud "Hey Dennis all you need is a doctors statement, then you can miss all the days you want". Everyone in the department started laughing.

Mr. McConnell held a meeting with plaintiff informing her she was seen in other areas of the department talking for more than 30 minutes. Plaintiff noticed defendant was making a paper trail of untrue statements which disturbed plaintiff very deeply. Plaintiff immediately called the medical center and applied for a short-term disability leave. Plaintiff's short-term disability began September 29, 1999.

A hostile work environment occurs when there is a pattern of ongoing and persistent harassment severe enough to alter the conditions of employment Draper, 147 F. 3d at 1108 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66-67 (1986)

As mentioned above, the same individuals were involved in most of these incidents. The incidents demonstrated a regular pattern of retaliatory conduct throughout plaintiff's employment.

3) Specific guidelines in Company Policy before terminating an employee

There are specific rules and regulations outlined in the NationsBank Code of Ethics

handbook. The policy mentions In the event specific information is not available regarding a particular situation or in the case of actions that appear to be or are direct violation of policy, the escalation path is as follow: *Associate's manager * Personnel generalist * Corporate Counsel* Ethics Committee and Chief Executive Officer.

It also states that issues that potentially could involved great risk to NationsBank and could have significant impact on operations will be escalated directly and immediately to Corporate Counsel and the Ethics Committee.

It would be logic to assume that plaintiff was a high risk to the bank because of her immediate dismissal. When dealing with risky situations defendant was obligated to follow the Escalation Path before terminating plaintiff. The other governing body was not involved which was a mandatory practice for the bank.

The company policy contained particular disciplinary procedures that the bank overlooked. The Court adapted defendant's reason for terminating plaintiff. Defendant states that plaintiff violated company policy because she worked for Centralize Servicing Center while on medical leave.

Defendant created new rules for plaintiff at the time of her termination because she reported their unlawful, discriminatory actions. The language in plaintiff's policy limited the employer's right to discharge her. Under Work Conflicts its says "Should Associates elect to pursue additional employment, engage in an independent business venture or

perform services for another business, civic or charitable organization during non-Nationsbank hours, associates will not allow such outside activity to interfere with their job performance or require such long hours as to affect their physical or mental effectiveness. Associates should keep their management aware of all such outside activities".

The policy mentions that associates "should keep managers aware of outside activities" not that they must. It was very important for the entire governing body to be involved with plaintiff termination process. If the Escalation Path was followed according to company policy, maybe they could have prevented any unlawful violations.

No where in the policy does it says and employee can not work a second job during non-Nationsbank hours while on medical leave. Plaintiff went on medical leave due to severe stress caused by the bank. It was defendant that put plaintiff in a financial bind because of her filed grievance letter.

Where specific grounds for discharge and discipline are set forth in an employers handbook or other employment guidelines, discharged employees have sometimes been successful in arguing that such specified grounds are exclusive and that, consequently, the discharge of an employee on other grounds is wrongful Conley v Board of Trustees (CA5 Miss) 707 F 2d 175.

4) Timely filed Motion for subpoena documents

Plaintiff filed a Motion for Issuance of

Subpoena on January 30, 2001. The United States District Court responded November 30, 2001, after they ruled on the case in favor of defendant. Plaintiff didn't get the opportunity to reply to the Courts denied motion in a timely matter.

A timely response from the Court, on plaintiff's motion, would have moved plaintiff in a different direction for more discoverable documents in her case.

Mo. Apps S.D. 1996 For purposes of general rule of discovery that parties may obtain information regarding any matter relevant to subject matter involved in pending action so long as matter is not privileged, the term " relevant " is broadly defined to include material reasonably calculated to lead to discovery of admissible evidence V.A.M.R. 56.01(b)(1).-State ex rel. Dixon Oaks Health Center, Inc. v. Long, 929 S.W. 2d 226, rehearing transfer denied.-Pretrial Proc 31

REASON FOR GRANTING THE PETITION

Defendant's unlawful actions are part of a series or pattern of discrimination, retaliation, hostile work environment and a violation of ADA that started at the beginning of plaintiff's employment which continued throughout plaintiffs tenure.

Defendant forced plaintiff into a financial bind because of her engaged, statutory protected activity. As a result, the bank wrongfully discharged plaintiff.

In granting this petition, it will highlight the

issues of importance, its particular facts and the individuals involved. It will also educate the public, the importance of the issues. Plaintiff has raised a genuine issue of disputed facts.

CONCLUSION

The petition for a writ of certiorari should be granted

Respectfully submitted,

Patricia A. Eubanks-Jackson

Date: 12/7/02

APPENDIX

APPENDIX: 1a United States District Court

APPENDIX: 1b United States Court of Appeals

APPENDIX: 1c United States Court of Appeals denying review

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

(Dated November 30, 2001)

No.4:00-CV-223(CEJ)

Patricia Ann Eubanks-Jackson)
)
Plaintiff,)
)
)
v.)
)
Bank of America, N.A.,)
)
Defendant)

MEMORANDUM AND ORDER

This matter is before the Court upon the defendant's motion for summary judgment and plaintiff's cross-motion for summary judgment.

Plaintiff Patricia Eubanks-Jackson brings this action under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e et seq.; the Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 et seq.; and the Missouri Human Rights Act, Mo. Rev. Stat. §§ 213.010 et seq. Plaintiff claims that her former employer defendant Bank of America, unlawfully discharged her and denied her promotions because of her race and disability, and

in retaliation for complaining of harassment. She also alleges that she was subjected to a hostile work environment, and that defendant breached a contract.

I. Legal Standard

Rule 56 (c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered " if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." In ruling on a motion for summary judgment the court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. AgriStor Leasing v. Farrow, 826 F. 2d 732, 734 (8th Cir. 1987). The moving party bears the burden of showing both the absence of a genuine issue of material fact and its entitlement to judgment as a matter of law. Anderson v. Liberty lobby, Inc., 477 U.S. 242 (1986) ; Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 586-587 (1986); Fed. R. Civ. P. 56(c). Once the moving party has met its burden, the non-moving party may not rest on the allegations of his pleadings but must set forth specific facts, by affidavit or other evidence, showing that a genuine issue of material fact exists. Fed. R. Civ. P. 56(e). Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial." Celotex Corporation v. Catrett, 477 U.S. 317, 322 (1986).

II. Background

Plaintiff, an African-American woman, began her employment with the bank in June 1997 as a Vendor Coordinator, at a grade level 9. For most of her employment, plaintiff's immediate supervisor was Katherine Holmes. Kevin McConnell later became plaintiff's Team Coach. Both Holmes and McConnell reported to Dennis Chier, who in turn reported to the Department Manager, Greg Wayman.

Plaintiff testified to a number of incidents that occurred while she worked under Holmes' supervision. According to plaintiff, Holmes persisted in trying to discourage plaintiff from seeking a promotion, she chastised plaintiff for doing things that Holmes had previously approved, she entered incorrect information in the computer so that it appeared as if plaintiff or another worker had made mistakes, assigned plaintiff extra work that should have been done by others, told plaintiff that she had to go through the application process for a Reviewer position, criticized plaintiff for time spent on personal phone calls, and rated plaintiff's performance too low. Plaintiff acknowledged that other employees on her team may have felt the same way she did about their treatment by Holmes, but she thought she received worse treatment by Holmes.

Plaintiff testified that Holmes assigned her the extra tasks of taking staples out of documents

and faxing documents, which plaintiff did for a week and a half. However, after plaintiff complained about the work, it was assigned to two other employees, one of who was a white male. On another occasion, when plaintiff questioned a performance appraisal completed by Holmes, it was changed and plaintiff was given the opportunity to add her own comments about the ratings she thought she deserved.

In the summer of 1999, Kevin McConnell, a white male, was promoted to a Team Coach position in which plaintiff had expressed an interest. At the time of his selection, McConnell had and undergraduate degree in Finance and had had supervisory experience before coming to work for the defendant. By comparison, plaintiff did not have a college degree and she had had no supervisory experience. The decision to select McConnell was made by Dennis Chier, the Team Leader. According to Chier, McConnell was selected because of his management and leadership experience, his education, and his ability to perform all of the functions of the department that he was to supervise. Plaintiff had written to Chier in June 1999, expressing her interest in a promotion and describing her qualifications. According to plaintiff, Chier told her that she would have to perform every job function within the department before she could be considered for a supervisory position and that her resume was "generic." Plaintiff applied for a second supervisory position in 1999 that was ultimately filled by a white female. Plaintiff testified that she did not know what this individual's qualifications were.

Plaintiff testified about a number of other

positions she sought within defendant's employ. As to some of these positions, plaintiff did not know whether they would have been considered promotions. Included among the positions plaintiff testified about were a Team Coach position which plaintiff applied for in March 1998; two Reviewer positions, one of which was filled by an African-American female and the other by a person unknown to the plaintiff; a Closer position that was filled by a person who was then working in that position; and two Team Support positions, one of which was filled by a white female whose qualifications were unknown to the plaintiff and the other by a white male who had had 25 years experience with the defendant.

On August 2, 1999, plaintiff submitted a grievance letter to a human Resources representative, in which she wrote that she had suffered "antagonizing t(h)reats" and "constant dishonest accusation which has lead (sic) to the unfair annual appraisal and the prevention of promotion" while working under Holmes' supervision. As an example of an "antagonizing threat," Plaintiff testified that Holmes told her that she should be afraid of losing her job because she was not meeting her production quota. She also testified that the "dishonest accusation" mentioned in the letter referred to Holmes giving her permission to leave and later denying that she had done so, or changing information on the computer system to make it appear that plaintiff had made mistakes.

In the letter plaintiff also accused Chier of "tactics (that) are discriminatory such as his remarks made towards me and other co-workers."

Specifically, plaintiff testified that Chier had called and African-American employee "boy," that he used the term "knocked up" in reference to a pregnant employee, that he told an African-American employee who had arrived late to work that she could find herself in the unemployment line, and that he suggested to an African-American employee that he "go back to where he came from because you're no liked over here." Plaintiff also referred to Chier's "constant put-downs," the "generic" resume comment, and his statement that plaintiff would have to perform every job within the department before she would be considered for a supervisory position.

Plaintiff could not recall whether she gave a copy of her grievance letter to any of her supervisors. However, the day after plaintiff submitted the letter, plaintiff met with two supervisors, Robert McGrath and McConnell, who told her that her wages had been overpaid and that she needed to make a plan to reimburse the defendant for the overpayment. Neither supervisor mentioned the grievance letter. Plaintiff agreed to an installment repayment plain. Plaintiff testified that at some point after she filed her grievance letter, Chier remarked to the team, "You had better watch what you say around here because people go back and tell Human Resources and they'll file a complaint on you."

In late August 1999, plaintiff complained of wrist pain and a knot on her hand, and was referred by the defendant to a clinic. The doctor who examined plaintiff told her that the condition was not work-related. The doctor noted that plaintiff's blood pressure was elevated, and

recommended that plaintiff follow up with her personal physician. Although the doctor stated that plaintiff could return to work without restriction, plaintiff went instead to a hospital emergency room because she was feeling dizzy and faint. The emergency room doctor gave plaintiff some medication to lower her blood pressure, and told her to stay home the next day and follow up with her physician. The doctor also gave plaintiff the name of a hand specialist.

Plaintiff saw her personal physician and received a prescription for high blood pressure medication. On September 8, 1999 plaintiff saw a hand specialist who restricted her to key entry only four hours a day, no forceful gripping, and required her to wear a splint. Plaintiff's supervisors honored the restrictions. On September 17, plaintiff submitted a doctor's statement that she should refrain from typing with her right hand. She was allowed to work without typing with her right hand, but McConnell told her that she needed to increase her work production.

Plaintiff testified that she was "out like once or twice a week going to see the doctor because of (her) stress," and that her physical impairments and absences became the topic of McConnell's and Chier's jokes. She further testified that while her workers compensation claim was pending and anonymous note was placed on her desk. The note read, "Do everything without complaining or arguing. Philippians 2:14."

In late September 1999, plaintiff requested medical leave of absence until October 27, based on her doctor's statement that she had severe

hypertension and stress. The defendant granted the request. Also in late September plaintiff began working at Centralized Servicing Center (CSC), a business involved in collecting loans. Plaintiff worked for CSC on a part-time basis for about two and a half months.

Plaintiff's request to extend her medical leave of absence through December 17, 1999 was granted by the defendant. In late November, while she was on leave, plaintiff telephoned the department manager Greg Wayman and asked to be assigned to a job that would accommodate her physical limitations and that was in a less stressful environment. Wayman replied that he would consider a transfer if plaintiff submitted records from her doctor.

At some point during plaintiff's leave of absence, Chier heard that plaintiff was working part-time for CSC. He reported this to Wayman, who referred the matter to the defendant's security department for investigation. On December 8, 1999, plaintiff received a letter from Ken Moeller of the bank's Corporate Security Department, asking her to contact him. Plaintiff met with Moeller on December 15, and Moeller asked plaintiff if she was working for another employer. Although plaintiff had resigned from CSC on December 7, she did not tell Moeller this. Instead plaintiff refused to answer Moeller's questions, asserting her right against self-incrimination.

After consultation with the Human Resources department and based on information from the security investigator, Wayman made the decision to terminate plaintiff's employment on

December 16, 1999. In his letter to plaintiff, Wayman stated that plaintiff was being discharged because she had not provided any information to contradict the bank's evidence that she was working for another company during her medical leave of absence.

III. Discussion

Employment discrimination on the basis of race is prohibited under Title VII and the MHRA. Courts apply the same analysis to claims arising under the federal and state statues. See Kehoe v. Anheuser-Busch, Inc., 96 F.3d 1095, 1101 n.8 (8th Cir. 1996). In the absence of direct evidence of discrimination, the burdenshifting analysis of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), and Saint Mary's Honor Center v. Hicks, 509 U.S. 502 (1993), applies to claims of discrimination. Ryther v. Kare 11, 108 F.3d 832, 836 (8th Cir.) (en banc), cert. denied, 117 S. Ct. 2510 (1997).

Under the burden-shifting analysis, plaintiff must first establish a prima facie case of intentional discrimination. McDonnell Douglas, 411 U.S. at 802. If the defendant articulates such a reason, the plaintiff must then demonstrate that defendant's reason is a pretext for discrimination. Id.; Kim, 123 F.3d at 1056. The burden of proving discrimination remains on the plaintiff at all times. St. Mary'' Honor Center, 509 U.S. at 515-16. The plaintiff must do more at the pretext stage than discredit defendant's reason; the plaintiff must show the defendant's articulated reason is a pretext for discrimination. Id. See also Ryther, 108 F.3d at 837; Hutson v. McDonnell Douglas Corp., 63 F3d 771, 777 (8th Cir. 1995). Evidence supporting the

prima facie case along with the showing of pretext can be sufficient in some circumstances to survive summary judgment. See Fisher v. Pharmacia & Upjohn, 225 F.3d 915, 922 (8th Cir. 2000) (citing Reeves v. Sanderson Plumbing Prods., Inc., 120 S. Ct. 2097, 2109 (2000)).

A prima facie case of discriminatory discharge requires plaintiff to show that (1) she was a member of a protected class; (2) she was qualified for the position; and (3) she was discharged from the position. See Rose-Maston v. NME Hosp., Inc., 133 F.3d 1104, 1108 (8th Cir. 1998).

Defendant assumes that plaintiff has made a prima facie case, but argues that plaintiff was discharged for a legitimate, non-discriminatory reason, namely, that she did not refute the defendant's information that she worked for another company during the time she was on a medical leave of absence. Plaintiff attempts to demonstrate that the reason is pretextual by showing that other employees of defendant also worked for CSC, but were not terminated. [1] The other bank employees whom plaintiff states were employed by CSC were also African-American. Thus, plaintiff has produced no evidence of a similarly-situated person outside her protected category who was treated differently. See Stanback v. Best Diversified Prods., Inc., 180 F3d 903, 910 (8th Cir. 1999) (plaintiff must show less favorable treatment than similarly situated employees outside protected group). Plaintiff has also not presented evidence that any of the employees were on disability leave while they worked for CSC. See Ghane v. West, 148 F3d 979, 982 (8th cir. 1998) (plaintiff has burden to show she is similarly

situated in all relevant aspects to individuals who were treated more favorably). Thus, the Court finds that plaintiff has not shown defendant's proffered reason for her termination to he pretextual.

The Court also finds that the comments plaintiff attributes to Chier do not suggest race-based animus sufficient to show pretext. Further, as discussed above, the decision to decision to discharge plaintiff

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[1]Plaintiff has filed a motion for issuance of a subpoena to CSC to produce employment information regarding seven bank employees who were employed by CSC during the same months that plaintiff was employed there. The Court finds plaintiff's undisputed testimony that the employees were employed during that time sufficient for purposes of this summary judgment motion. Thus, the motion will be denied as moot.

was made by Wayman, not by Chier. See Ziegler v. Beverly Enterprises-Minnesota, Inc., 133 F.3d 671, 676 (8th Cir. 1998). See Simmons v. OCE-USA, Inc., 174 F.3d 913, 916 (8th Cir. 1999) (stray remarks not associated with termination decision and remote in time from adverse employment action do not alone support finding of pretext).

In order to meet her prima facie burden on her failure-to-promote claims, plaintiff must show that (1) she was a member of a protected group; (2) she was qualified and applied for a promotion to a position for which the employer was seeking applicants; (3) she was not promoted; and (4) similarly situated employees, not part of the protected group, were promoted instead. See Lyoch v. Anheuser-Busch Cos., 139 F.3d 612, 614 (8th Cir. 1998). For the following rasons, the Court concludes that the defendant is entitled to judgment on these claims.

With respect to the Team Coach position that was filled by McConnell, the evidence establishes that the defendant selected him because of his prior management experience, his educational background, his demonstrated leadership ability, and his ability to perform all of the functions within the department. Plaintiff has not shown these reasons to be pretextual. Further, plaintiff has made no showing as to the qualifications of the individual who was selected for the second Team Coach position or that the defendant's reasons for the selection were pretextual.

Plaintiff has also failed to meet her burden of establishing a prima facie case with respect to the

Team Support positions she sought. Plaintiff's evidence on this issue consists solely of the race of one individual selected and the tenure of the other. The plaintiff's evidence with respect to the two Reviewer' positions she applied for is even less demonstrative---one of the individuals selected could not be identified at all and the other was, like plaintiff, and African-American female.

As to the Team Coach position that plaintiff claims she applied for in March 1998 and that was filled in October 1998, the plaintiff's claim is untimely. Plaintiff filed her charge of discrimination on December 6, 1999, which was more than 300 days after she was not selected for the position. See 42 U.S.C. § 2000e-5 (e) (1) (EEOC charge must be filed within 300 days). The denial of a promotion does not constitute a continuing violation, a part of which occurs outside the 300-day period. See High v. University of Minn., 236 F.3d 909, 909 (8th Cir. 2000) (per curiam) (failure to promote is discrete act, not covered by continuing violation doctrine).

The plaintiff's allegation of "unfair treatment" will be liberally construed by the Court as a hostile work environment claim. In order to state a claim of hostile work environment harassment, plaintiff must prove that (1) she is a member of a protected group; (2) unwelcome harassment occurred; (3) a causal connection existed between the harassment and her protected-group status; and (4) the harassment affected a term, condition, or privilege of employment. See Bradley v Widnall, 232 F.3d 626, 631 (8th Cir. 2000). "Hostile work environment harassment occurs when the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or

pervasive to alter the conditions of the victim's employment and create and abusive working environment. Id. (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)). The factors to consider include the frequency of the discriminatory conduct; the frequency of the conduct, whether it is physically threatening or humiliating, or merely an offensive utterance; and whether it unreasonably interferes with an employee's work performance. See id.

As discussed above, the plaintiff attributes a number of statements and actions to Holmes and Chier, which she considered to be unfair. However, plaintiff has presented no evidence showing that the statements or actions were directed to her because of her race. Further, conduct of the type plaintiff complains of has been found to be insufficient to support a hostile work environment claim. See Bradley, 232 F.3d at 631-32. The Court finds that plaintiff has not shown that the conduct was so severe or pervasive as to alter the conditions of her employment.

To establish a prima facie case of discrimination based on disability, plaintiff must show that (1) she is disable within the meaning of the ADA; (2) she is qualified to perform the essential functions of her job with or without reasonable accommodation; and (3) she suffered and adverse employment action because of her disability. See Wilking v. County of Ramsey, 153 F.3d 869, 872 (8th Cir. 1998). In order to show that she is disabled within the meaning of the ADA, plaintiff must demonstrate that she has an impairment that substantially limits one or more major life activities. See Snow v. Ridgeview Med.

Ctr., 128 F.3d 1201, 1206 (8th Cir. 1997). The Court must consider the nature and severity of the impairment, its duration, and its long-term impact. Id. at 1207. Inability to perform any particular job does not present a substantial limitation of the major life activity of working; rather, plaintiff would have to be prevented from performing an entire class or a broad range of jobs as compared to the average person of comparable training, skills, and abilities. Id. at 1206-07.

The evidence establishes that plaintiff suffered from hypertension along with hand wrist pain which, for a period of time limited her ability to use her right hand. However, there is no evidence that either of these impairments was disabling within the meaning of the ADA. See 42 U.S.C. § 12102(2). Hypertension, if controlled, does not substantially limit any major life activity. See Hill v. Kansas City Area Transport. Auth., 181 F.3d 891, 894 (8th Cir. 1999). In any event, plaintiff testified in her deposition that her high blood pressure did not interfere with any of her activities, and she submitted documentation stating that she is not disabled now, nor was she during her employment. The fact that plaintiff worked for another employer during her disability leave further weakens her claim that she was disabled.

The Eighth Circuit has not recognized a cause of action for harassment based on disability. However, in this case, the Court will assume that an ADA claim based on hostile work environment would be deemed cognizable. See Wallin v. Minnesota Dep't of Corr., 153 F.3d 681, 687-88 (8th Cir. 1998) (assuming without deciding that if disability harassment is recognized in this Circuit,

it will be analyzed similar to Title VII harassment). To the extent that the plaintiff is asserting such a claim, the evidence does not support it. While plaintiff may have been irritated by the anonymous note and the remarks she believes were made about her physical impairments, this conduct cannot be considered severe or pervasive enough to create a hostile work environment. The ADA does not require and employer to provide and "aggravation-free environment" Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 728 (8th Cir. 1999).

With respect to her claim of retaliation, plaintiff must show that (1) she filed a charge of harassment or engaged in other protected activity; (2) her employer subsequently took adverse employment action against her; and (3) the adverse action was causally linked to her protected activity. See Buettner v. Arch Coal Sales Co., 216 F.3d 707, 713-14 (8th Cir. 2000). Plaintiff asserts that she was retaliated against for complaining that defendant had breached a contract, for filing a "grievance letter" with defendant's Human Resources department on August 2, 1999, and for filing a workers compensation claim on August 30, 1999. According to the plaintiff, the defendant retaliated in the following ways: (1) required her to repay wages that she had been paid by mistake, (2) required her to do extra work, (3) denied her request for a schedule change, (4) subjected her to a hostile work environment, (5) selectively enforced company rules against her, (6) subjected her to severe discipline, (7) singled her out to be "watched," (8) denied her promotions, (9) and discharged her.

Assuming that the complaints and

grievances plaintiff made constituted statutorily protected activity, her retaliation claim fails nevertheless. The assignment of extra work involving stapling and faxing documents, denial of a schedule change, and the recoupment of overpaid wages do not constitute adverse employment actions. See LaCroix v. Sears, Roebuck, & Co., 240 F.3d 688, 691 (8th Cir. 2001) (adverse actions involve material employment disadvantage, such as change in salary, benefits, or responsibilities). Plaintiff has not identified any company rule that was selectively enforced against her nor does she describe the severe discipline she was subjected to. Additionally, plaintiff has offered no evidence that she was subjected to "oppressive supervision" and "constant surveillance" to amount to retaliation. Cf. Francis v. American Tel. & Tel. Co., 55 F.R.D. 202, 207 (D.D.C. 1972).

Of course, denial of a promotion and discharge are adverse employment actions that may form the basis of a retaliation claim. However, as discussed above, the defendant has presented legitimate, non-discriminatory reasons for not selecting plaintiff for promotion and for discharging her, and the plaintiff has not shown these reason to be pretextual.

Finally, the plaintiff's breach of contract claim is based on the fact that she was classified as a Vendor Coordinator even though a requisition form identified her as a new hire in the position of Closer. The requisition form was not a contract, as it did not create obligations on the part of either party and did not constitute an offer that could have created a power of acceptance. See West Central Mo. Regional Lodge No. 50, 939 S.W.2d

565, 567-68 (Mo. Ct. App. 1997); Johnson v. McDonnell Douglas Corp., 745 S.W.2d 661, 662 (Mo. 1988). Thus, plaintiff's breach of contract claim fails.

Accordingly,

IT IS HEREBY ORDERED that defendant's motion for summary judgment (Doc. #50) is **granted.**

IT IS FURTHER ORDERED that plaintiff's cross-motion for summary judgment (Doc. #53) is **denied.**

IT IS FURTHER ORDERED that plaintiff's motion to compel (Doc #32) and motion for a trial date (Doc. #62) are **denied as moot.**

An appropriate Judgment will accompany this Memorandum and Order.

"S/Carol E. Jackson"
CAROL E. JACKSON
UNITED STATES DISTRICT JUDGE

Dated this 30th day of November, 2001.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-4018

PATRICIA EUBANKS-JACKSON)
)
Appellant,)
)
vs.)
)
BANK OF AMERICA N.A.)
)
Appellee.)

(UNPUBLISHED)

Submitted: April 29, 2002
Filed: May 6, 2002

Before McMILLIAN, BOWMAN, and BYE, Circuit Judges

PER CURIAM.

Patricia Ann Eubanks-Jackson appeals the District Court's[1] grant of summary judgment to her former employer, Bank of America, N.A., in her employment discrimination action. Having carefully reviewed the record, see Land v. Washington County, Minn., 243 F.3d 1093, 1095 (8th Cir. 2001) (de novo standard of review), we affirm.

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[1]The honorable Carol E. Jackson, United States District Judge for the Eastern District of Missouri.

The District Court did not abuse its discretion in granting summary judgment to Bank of America before ruling on Eubanks-Jackson's motion to subpoena documents, as she did not request a continuance or file a Federal Rule of Civil Procedure 56(f) affidavit, and the documents she sought would not have shown that she was treated differently than similarly situated white employees. See Stanback v. Best Diversified Prods., Inc., 180 F.3d 903, 910-11 (8th Cir. 1999).

Summary judgment was proper on Eubanks-Jackson's Title VII race-based failure-to-promote claims, as most of the decisions at issue were made more than 300 days before she filed her Equal Opportunity Employment Commission complaint, see 42 U.S.C. § 2000e-5(e)(1) (1994); High v. Univ. of Minn., 236 F.3d 909, 909 (8th Cir. 200) (per curiam) (observing that the continuing-violation doctrine does not apply to discrete acts, such as failure to promote), and she did not show that she and Kevin McConnell were similarly qualified, see McCullough v. Real Foods, Inc., 140 F.3d 1123, 1126 (8th Cir. 1998). We agree with the District Court that her evidence also fell short of showing that Bank of America's reason for its decision to discharge her-her refusal to respond to charges that she was working elswhere while she was on medical leave at Bank of America-was pretextual. See Forrest v. Kraft Foods., Inc., No. 01-2854, 2002 WL 496448, at **2 (8the Cir. Apr. 3, 2002). Contrary to Eubanks-Jackson's contentions, Vice President Wayman was not required to review the investigation information before terminating her. See Scroggins v. Univ. of Minn., 221 F.3d 1042, 1045 (8th Cir. 2000) (explaining that relevant inquiry is whether employer believed employee was guilty of conduct justifying discard). Neither was she entitled to invoke

her privilege against self-incrimination when she met with Bank of America's investigator. Cf. Cerro Gordo Charity v. Fireman's Fund Am. Life Ins. Co., 819 F.2d 1471, 1480 (8th Cir. 1987) (describing circumstances in which Fifth Amendment privilege applies).

Further, the District Court correctly concluded that the evidence was insufficient to show that Eubanks-Jackson's carpal tunnel syndrome or hypertension was disabling under the Americans with Disabilities Act (ADA), see Aucutt v. Six Flags Over Mid-Am., Inc., 85 F.3d 1311, 1318-19 (8th Cir. 1996) (holding that employee was not disabled for the purposes of the ADA because he failed to show that nature, duration, and long-term impact of his angina, hypertension, and coronary artery disease caused him substantial limitations in any major life activity), that her workers' compensation settlement with Bank of America did not prove the bank regarded her as disabled, see Brunko v. Mercy hosp., 260 F.3d 939, 942 (8th Cir. 2001) (affirming summary judgment against employee who did not meet the actual or perceived disability element of a prima facie ADA-discrimination case), and that the incidents she attributed to her co-workers and supervisors did not constitute a hostile work environment under the ADA or Title VII, cf. Jeseritz v. Potter, 282 F.3d 542, 547-48 (8th Cir. 2002) (assuming without deciding that if an ADA claim for hostile work environment existed, it would be modeled after the similar Title VII claim).

Finally, most of the alleged retaliatory acts Eubanks-Jackson cited were not adverse employment actions, see Gagnon v. Sprint Corp., 284 F.3d 839, 850 (8th Cir. 2002) (defining adverse employment action for purposes of Title VII retaliation claim), Stafne v. Unicare Homes, 266 F.3d 771, 775 (8th Cir.

2001) (retaliation under ADA), she did not adequately challenge Bank of America's legitimate nondiscriminatory reason for termination her, see Hunt v. Neb. Pub. Power Dist., 282 F.3d 1021, 1028 (8th Cir. 2002) (setting forth burden-shifting analysis for retaliation claims), and neither the requisition form nor the ethics policy created a binding under Missouri law, see Clark v. Washington Univ., 906 S.W.2d 789, 791 (Mo.Ct. App. 1995).

Accordingly, we affirm.

A true copy

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

(Dated June 19, 2002)

No. 01-4018

Patricia Ann Eubanks-Jackson	)
	)
Appellant,	)
	)
v.	)
	)
Bank of America, N.A.,	)
	)
Appellee.	)

Order Denying Petition for Rehearing and for Rehearing En Banc

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Judge Morris Sheppard Arnold took no part in the consideration of this matter.

(5128-010199)

Order Entered at the Direction of the Court:
"S/Michael E. Gans"
Clerk, U.S. Court of Appeals, Eighth Circuit